STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER D. SCHNORR,

Defendant-Appellant.

UNPUBLISHED
April 27, 2004

No. 244183
Macomb Circuit Court
LC No. 2001-002243-FH

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to a term of imprisonment of two years for the felony-firearm conviction, to be served before and consecutive to concurrent terms of 570 to 720 months each for the robbery and conspiracy convictions. We modify the minimum sentences for the robbery and conspiracy convictions to 480 months each, and remand for correction of the judgment of sentence, but affirm in all other respects.

I. Facts

Defendant's convictions arise from a robbery that took place at the Rivercrest Family Dining restaurant in Clinton Township, on the evening of April 10, 2001. The owner of the restaurant testified that he was in the kitchen repairing a microwave oven when two intruders came in through the back door, one of whom pointed a gun at the witness' head and ordered him to the floor. The intruders then gathered all the employees in the restaurant and forced them to join the owner on the floor, and demanded to know who the manager was. The owner identified himself, was escorted to the cash register by the gunman, and opened the register, but the gunman demanded more money than what he found in the register. According to the owner, he then went to the office and opened a safe, and heard a gunshot. The owner stated that the gunman "kind of gathered up all the money and ran out the door," adding that in all "around $3000" was taken. At a subsequent lineup, another employee of the restaurant, Konstantino "Tino" Koutsimbas, identified defendant as the armed assailant.

II. Identification Testimony

Of the several prosecution witnesses, only Koutsimbas identified defendant as the armed assailant. Defendant argues that this witness' identification was improperly admitted at trial because the identification stemmed from a suggestive pretrial proceeding. The trial court convened an evidentiary hearing to decide the identification issues, and ultimately concluded that "Mr. Koutsimbas is a wonderful witness and he, absolutely, is capable of identifying."

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous; clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J), 318 (Boyle, J); 505 NW2d 528 (1993); *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Kurylczyk, supra* at 311-312, 318; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, that witness' in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the improper identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) (citations omitted).

Defendant cites a litany of reasons why Koutsimbas' identification of defendant should have been found inadmissible. We find no merit to any of defendant's arguments.

Defendant argued below, and the trial court agreed, that the restaurant's owner's identification of defendant was tainted by a suggestive pretrial proceeding; thus, the trial court disallowed that witness from offering identification testimony at trial. Defendant now claims that that taint should implicate Koutsimbas' identification as well. This claim is without merit.

Defendant argues that a discrepancy between the description of the assailant given by Koutsimbas and defendant's actual characteristics should render the identification impermissible. Koutsimbas had described the assailant to the police as standing six feet, two or three inches tall, and weighing 210 pounds; but defendant is but five feet, ten or eleven inches tall, and weighs only approximately 185 pounds. Defendant regards this discrepancy as a great one, but we do not agree.

Defendant further argues that Koutsimbas' identification is inadmissible because Koutsimbas admitted at trial that the main focus of his attention was on the gun, as opposed to the gunman's face, at the time of the incident. However, defendant cites no authority for the proposition that a witness may attest only to those matters that had primarily engaged his or her attention. Any consideration of this testimony goes to weight, not admissibility.

Additionally, defendant contends that Koutsimbas participated in two police lineups, and identified defendant in one lineup, but hesitated about identifying anyone in the other lineup.

Defendant asserts that the witness thus twice tried to identify him, but completely failed one of those times. However, a reading of the witness' account shows it more likely that the witness hesitated when he was trying to identify the second intruder, not the gunman. Any difficulties the witness had in this regard bore only indirectly on the veracity of the unequivocal identification of defendant.

Defendant cites evidence that the restaurant's owner discussed with Koutsimbas how a police officer effectively confirmed his identification of defendant as the primary suspect, after the lineups and before the preliminary examination, and suggests that this development tainted Koutsimbas' identification of defendant. We disagree. Defendant alleges no possible taint before Koutsimbas initially identified him in the corporeal lineup, and commentary by laypersons in the aftermath does not impart as much taint as suggestive commentary by the police. See *United States v Gentile*, 530 F2d 461, 468 (CA 2, 1976) (where there was "no claim that the out-of-court confrontation was in any way anticipated or arranged by the government . . . the dangers of improper influence . . . were not present"); *Wilson v Commonwealth*, 695 SW2d 854, 857 (Ky, 1985) ("in order to establish that a pre-trial confrontation was unduly suggestive, the defendant must first show that the government's agents arranged the confrontation or took some action during the confrontation which singled out the defendant").

The irregularities to which defendant points in connection with Koutsimbas' identification of him thus all go to weight, not admissibility. See *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972) (even where the witnesses' identification of the defendant is less than positive, the question remains one for the jury). Because defendant points to no impropriety attendant to Koutsimbas' initial identification of defendant, and no such irregularity attributable to the government that followed, we conclude that the trial court did not clearly err in holding that Koutsimbas could properly identify defendant in court as the armed assailant who robbed the restaurant.

III. Instruction on Identification

Defendant argues that the trial court erred in declining to instruct the jury specially on four factors involved with eyewitness identification, as set forth in *People v Anderson*, 389 Mich 155, 172; 205 NW2d 461 (1973). Specifically, defense counsel suggested before trial that the trial court announce that it had taken judicial notice that (1) the police and prosecutors routinely, and often necessarily, resort to eyewitness identification, (2) it is "scientifically and judicially recognized . . . that there are serious limitations on the reliability of eyewitness identification," (3) "police and prosecution procedures often (and frequently unintentionally) mislead eyewitnesses into misidentification," and (4) it is historically and legally established that "a significant number of innocent people have been convicted of crimes they did not commit and the real criminal was left at large." See *id.*

Defendant presented an expert at trial who testified to the imperfections that inhere in eyewitness identification, and on appeal presents several texts and other authorities that underscore the undeniable point that there have been many wrongful convictions based on eyewitness identifications, several of which are known to have resulted in death sentences in recent times.

We are mindful that eyewitness identification has not proved to be infallible, but defendant cites no authority for the proposition that a trial court must specially disparage eyewitness identification when instructing a jury, and we are not about to introduce such a rule of law here. It has been long held that the accounts of a single eyewitness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. See *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976); *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971). Defendant's evidence and arguments bear on the weight to be afforded eyewitness identification, but do not establish that such identification is inherently inadequate as a matter of fact or law.

Further, the instructions the trial court actually provided sufficiently addressed the uncertainties of eyewitness identification:

> One of the issues in this case is the identification of the Defendant as the person who committed the crime. The Prosecutor must prove beyond a reasonable doubt that the crime was committed and that the Defendant was the person who committed it. In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at the time.
>
> Also think about the circumstances at the time of the identification such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.
>
> You may also consider any times that the witness failed to identify the defendant or made an identification or gave a description that did not agree with . . . his identification of the defendant during the trial.
>
> You should examine the witness identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the Defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the Defendant was the person who committed the crime.

For these reasons, we reject defendant's claim of error.

IV. Res Gestae Witness

Defendant argues that the trial court erred in failing to instruct the jury specially in response to the nonappearance of a prosecution witness who had been endorsed, but whom the prosecutor failed to produce. We disagree.

If the prosecutor endorses a witness, the prosecution is generally obliged to produce that witness at trial. *People v Eccles*, ___ Mich App ___; ___ NW2d ___ (Docket No 242357 released January 20, 2004), slip op 5; *People v Cummings*, 171 Mich App 577, 583-585; 430

NW2d 790 (1988), citing MCL 767.40 and MCL 767.40a. However, the prosecution may be relieved of its duty to produce the res gestae witness[1] by showing that the witness could not be produced despite an exercise of due diligence." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *Cummings*, *supra* at 585.

Defendant's argument concerns the prosecution's failure to produce as a witness a second cook from the restaurant, John Brown, who was present at the incident in question. On the eve of the last day of trial, when the prosecutor admitted to failing to find the witness, the trial court took testimony from a police officer to ascertain whether proper efforts had been taken. The officer described telephoning Brown only to discover that the line was not in service. The officer additionally detailed checking Brown's address with the Secretary of State's office, and sending two detectives to the address who indicated that no one answered the door and there were no cars parked about the premises. A subpoena was prepared and mailed for this witness a month earlier, but there was no response. The police witness interjected that the owner of the restaurant had indicated that Brown left his employment in bad terms, and that there had been no further contact between the two. The trial court issued a warrant for Brown in hopes that he might appear the next day.

At the beginning of the next day's proceedings, the police witness returned and stated that additional efforts again failed to produce Brown. These efforts included searching the Internet for a current address and phone number, trying the latter number twice, checking the last known address again repeatedly and leaving a business card there, and trying to find a neighbor to question about Brown's whereabouts. The trial court concluded that this evidence indicated "a sufficient exercise of due diligence," and thus that no special jury instruction would be given.

CJI2d 5.12, the standard jury instruction regarding a missing res gestae witness, advises the jury that the witness in question "is a missing witness whose appearance was the responsibility of the prosecution." It further states, "You may infer that this witness's testimony would have been unfavorable to the prosecution's case." In this case, when it became apparent that Brown would not appear, defense counsel requested that instruction, but the trial court denied the request.

We find no error with the trial court's decision. The trial court did not err in crediting the police witness' report of the parade of efforts to contact Brown, and did not err in concluding that those efforts constituted due diligence – even though most of these efforts were made during the last two days of trial.

We note that defendant wished to examine Brown in order to highlight that Brown attended a lineup but was unable to identify any assailant. Although defense counsel might have made some point out of having Brown come to court and recount that experience, given the fact that, of the several persons present during the robbery only one identified defendant, counsel's

[1] A res gestae witness is one who witnessed some event in the continuum of the criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

inability to elicit from another that he could not make such an identification would have done little to strengthen the defense.[2]

For these reasons, defendant's argument concerning this issue fails.

V. Cumulative Error

Defendant suggests that if no single claim of error itself warrants reversal, such relief is nonetheless required in the face of the cumulative effect of all such errors. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Because we conclude that defendant has failed to show any single prejudicial error, defendant's argument concerning cumulative error is unavailing. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

VI. Habitual Offender Status

Defendant argues that the trial court erred in allowing the prosecutor to amend the habitual offender notice to replace an originally listed prior conviction that did not support habitual offender sentencing enhancement with one that did. We disagree. This Court generally reviews a trial court's decision to permit a prosecutor to amend a criminal information for an abuse of discretion. MCL 767.76. However, questions of law are reviewed de novo. *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997).

The original habitual offender notice, filed August 17, 2001, specifies three prior felonies, and states that defendant accordingly stands "subject to the penalties provided by MCL 769.12." Two of those listed felonies, however, are actually one for habitual offender purposes – a breaking and entering conviction and a probation violation attendant to that.

Although there is no dispute that defendant's record includes eight prior felony convictions, defendant argues that the late-discovered defect in his habitual offender notice could not be corrected on the eve of sentencing.[3] See MCL 769.13(1). Defendant thus asks this Court to turn a minor procedural flaw into a vested right to avoid the legal consequences of the habitual-fourth status that he has factually earned.

The purpose of habitual offender notice is to "provide a defendant with notice, at an early stage of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense." *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987). Accordingly, a prosecutor may not amend the habitual offender notice after the time provided by MCL 769.13(1) to change the habitual offender level to a higher degree, but may do so "to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *People v Hornsby*, 251 Mich App 462, 472; 650 NW2d 700 (2002).

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[2] We further note that Brown's failure to identify a suspect in the lineup came to the jury's attention through other testimony.

[3] We further note that the erroneous entry within the habitual offender notice was a matter of record since August 17, 2001, but that defendant declined to file a motion attendant to that until after trial, nearly a year later.

See also *People v Ellis*, 224 Mich App 752, 757 n 2; 569 NW2d 917 (1997); *Manning*, *supra* at 644-645.

Accordingly, because the original habitual offender notice specified habitual-fourth status, and because the prosecutor's amendment did not change that, the trial court did not err in allowing the amendment. Defendant was properly sentenced as a fourth habitual offender.

VII. Indeterminate Sentencing

Defendant observes that his minimum sentences respectively for robbery and conspiracy, 570 months (47-1/2 years), are greater than two-thirds of the maximum sentences, 720 months (sixty years), and argues that the minimums are thus too high a proportion of the maximums. We agree. Where indeterminate sentencing is appropriate, the minimum sentence may not exceed two-thirds the maximum. MCL 769.34(2)(b); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). The remedy for violations of this principle is to reduce the minimum sentence to two-thirds the maximum. *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994). Accordingly, given the sixty-year maximum sentences, we vacate defendant's minimum sentences for robbery and conspiracy and remand this case to the trial court with instructions to reduce the sentences to 480 months (forty years) each.[4]

We note additional irregularities in the amended judgment of sentence that the trial court should correct as well. First, the judgment of sentence identifies the conviction offenses for counts one and three as armed robbery, but the codes accompanying both offenses indicate conspiracy to commit armed robbery. Because defendant was clearly convicted of armed robbery (count one) and conspiracy to commit armed robbery (count three), the judgment should be corrected to reflect these distinct offenses and the appropriate accompanying codes. Second, although the trial court clearly announced separate sentences for the armed robbery, conspiracy, and felony-firearm convictions, the judgment of sentence lists a single sentence of 570 to 720 months for count one (armed robbery) only. Third, despite listing only a single sentence, for count one, the judgment refers to multiple sentences in the context of explaining the interrelationships of the sentences for the various convictions, indicating that the felony-firearm sentence (count 2) is to be served first, MCL 750.227b(2), but then further stating both that "CT. 1 AND CT. 3 ARE TO BE SERVED CONSECUTIVE TO CT. 2," and "CT. 2 IS TO BE SERVED CONCURRENT TO CT. 1 AND CT. 3." These statements are inconsistent with the listing of only a single sentence in the judgment of sentence, and the latter two statements are inherently contradictory as well. The trial court's statements at sentencing clearly indicate its intention to impose separate sentences of 570 to 720 months each for the robbery and conspiracy convictions, which it correctly indicated were to be served concurrent with each other, but consecutive to a two-year term for the felony-firearm conviction, which was to be served first. MCL 750.227b(2); *People v Brown*, 220 Mich App 680, 681-682; 560 NW2d 80 (1996). On remand, the court should correct these clerical errors, with the minimum sentences for armed robbery and conspiracy being reduced to 480 months as previously discussed.

[4] The prosecutor acknowledges error in this regard, and recommends the same remedy.

We affirm defendant's convictions and sentences as modified, and remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood